

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

APMC, INC., d/b/a A PLUS MEDICAL)
OF OKLAHOMA,)
Plaintiff,)
v.)
MICHAEL FOGARTY, Chief Executive)
Officer of the Oklahoma Health Care) Case No. CIV-08-249-L
Authority; LYNN MITCHELL, M.D.,)
State Medicaid Director; KELLY)
SHROPSHIRE, investigator for the)
Oklahoma Health Care Authority, sued)
in their official and individual capacities,)
Defendants.)

RESPONSE TO DEFENDANTS' NOTICE OF RELATED CASE

Plaintiff, APMC, Inc., d/b/a A Plus Medical of Oklahoma ("A Plus") hereby files this response in opposition to the Oklahoma Health Care Authority's ("OHCA") Notice of related case and submits the following in support. The Court should strike the OHCA's Notice because (1) OHCA is a non-party to this lawsuit, (2) Local Civil Rule 3.7 does not apply as this matter does not involve the same parties, the same claims, and is not another lawsuit, and (3) Plaintiff is not required to exhaust administrative remedies before filing a 42 U.S.C. § 1983 action. Defendants, Michael Fogarty, Lynn Mitchell, and Kelly Shropshire (collectively, "Defendants") are not a party to OHCA's Notice.

On January 7, 2008, Kelly Shropshire, as representative for the OHCA demanded A Plus pay OHCA almost one million dollars. Shropshire based this demand for recoupment on purported overpayments to A Plus dating back to 2004 for certain medical supplies. *See* Jan. 7, 2008 Letter from Kelly Shropshire, attached as Exhibit 1.

Shropshire acted outside the scope of his authority in this request because he did not have all pertinent patient files or records. A Plus filed this action on March 7, 2008, pursuant to 42 U.S.C. § 1983 seeking damages and equitable relief from Defendants in their individual and official capacities. Specifically, A Plus sought relief related to those violations *arising out of* "Defendants' (1) withholding of Medicaid payments owed to A Plus, (2) recoupment of Medicaid funds owed to A Plus, and (3) termination of A Plus' contract in retaliation for A Plus' insistence on compliance with federal law." *See* Complaint. On April 15, 2008, A Plus received Notice of its right to appeal the OHCA decision to recoup from January 7, 2008. *See* April 15, 2008 Letter from Kelly Shropshire, attached as Exhibit 2. In order to preserve its administrative appeal rights with regard to the recoupment of funds, A Plus filed an Administrative Appeal of the OHCA decision on May 5, 2008. This pending administrative proceeding does not relate to those illegal acts taken against A Plus by Defendants Fogarty, Shropshire and Mitchell as alleged in the Complaint filed with this Court.

1. OHCA is Not a Party to this Lawsuit.

OHCA filed this Notice and is not a party to this suit. A Plus did not file the suit against Defendants disputing the OHCA regulations, policies and procedures. Rather, A Plus specifically objects and alleges that Defendants abused their authority as officials with the OHCA in failing to adequately investigate, in depriving A Plus of its due process rights, and in arbitrarily taking actions against A Plus without cause, proof, or justification.

2. Local Civil Rule 3.7 Does Not Apply to this Lawsuit.

Local Civil Rule 3.7 specifically states

Attorneys for the plaintiff and defendant, . . . , shall file a written notice with the Court if they are aware, after reasonable inquiry, of any companion case or related case(s) filed in any court involving (1) common property, (2) common issues of fact or growing out of the same transaction, or The notice of related or companion case should provide the name of the court, the judge and the case number(s) of the related or companion case(s).

Local Civil Rule 3.7 does not apply to the instant matter because the issues before this Court and the issue before the administrative appeal are separate and distinct. Local Civil Rule 3.7 only applies to other pending "case(s) filed in any court." Further, this case does not involve the same parties. A Plus filed an administrative appeal of the OHCA decision demanding recoupment of A Plus monies, while A Plus filed this suit against Fogarty, Shropshire, and Mitchell for their violations of federal law affecting A Plus. Finally, the instant lawsuit involves violations of due process and Defendants abuse of power, while the administrative appeal specifically requests reconsideration of OHCA's demand for immediate recoupment of nearly one million dollars. This matter does not fall within the confines of Local Civil Rule 3.7. The administrative appeal and this case involve different parties and different issues. Furthermore, the administrative appeal is not pending in a Court, therefore OHCA's notice should be stricken.

3. A Plus is Not Required to Exhaust Administrative Remedies.

The Court has finally resolved that A Plus need not exhaust any administrative remedies prior to seeking relief pursuant to 42 U.S.C. § 1983. *See Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 522 (1990). OHCA's notice of relate case should not operate as a motion to stay the instant proceeding or have effect on the instant proceeding.

For these reasons, A Plus respectfully requests that this Court strike OHCA's Notice of Related Case because OHCA is not a plaintiff or defendant to this action, this matter does not fall within Local Civil Rule 3.7 as it is not regarding the same parties, issues, or involving another Court, and A Plus need not exhaust administrative remedies prior to filing a 42 U.S.C. § 1983 matter.

Respectfully submitted,

s/Kevin. D. Gordon

D. Kent Meyers, OBA # 6168
Kevin D. Gordon, OBA #10826
Rustin J. Strubhar, OBA #15850
Alison M. Howard, OBA #19835
CROWE & DUNLEVY
20 North Broadway, Suite 1800
Oklahoma City, OK 73102-8273
(405) 235-7700
(405) 239-6651 (Facsimile)
kent.meyers@crowedunlevy.com
kevin.gordon@crowedunlevy.com
rustin.strubhar@crowedunlevy.com
alison.howard@crowedunlevy.com

And-

Aletia Haynes Timmons, OBA #11855
TIMMONS & ASSOCIATES, L.L.C.
527 NW 23rd Street, Suite 200
Oklahoma City, Oklahoma 73103
(405) 602-5393
(405) 602-5390 (Facsimile)
atimmons@coxinet.net

ATTORNEYS FOR PLAINTIFF APMC,
INC. d/b/a A PLUS MEDICAL OF
OKLAHOMA

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2008, I electronically transmitted to the Court Clerk using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Christopher J. Bergin
Christopher.bergin@okhca.org

Nicole Nantais
Nicole.nantais@okhca.org

Kevin D. Gordon
kevin.gordon@crowedunlevy.com

Rustin J. Strubhar
rustin.strubhar@crowedunlevy.com

Alison M. Howard
alison.howard@crowedunlevy.com

Aletia Haynes Timmons
atimmons@coxinet.net

s/ Kevin D. Gordon

Kevin D. Gordon, OBA #10826
CROWE & DUNLEVY
A Professional Corporation
20 North Broadway
Suite 1800
Oklahoma City, OK 73102-8273
(405) 235-7700 (Main)
(405) 239-6619 (Direct)
(405) 272- 5260 (Facsimile)
E-Mail: kevin.gordon@crowedunlevy.com